Simon ak Sandom v Wong Choong Fooi (ACP) (Pengerusi Lembaga Tatatertib Polis Johor) & Ors

HIGH COURT (JOHOR BAHRU) — APPLICATION FOR JUDICIAL REVIEW NO 25–131 OF 2011
TEO SAY ENG J
29 FEBRUARY 2016

Administrative Law — Judicial review — Dismissal of public servant — Police lance corporal dismissed from service — Whether dismissal valid — Urine test showing positive for dangerous drug — Charged of insubordination under reg 4(2)(i) of the Public Officers (Conduct and Discipline) Regulations 1993 — Applicant allowed to make written representation — Whether disciplinary taken in compliance with regs 7(1) and 7(2) of the Regulations — Whether urine test report valid — Whether breach of rules of natural justice — Whether applicant accorded reasonable opportunity of being heard — Whether oral hearing necessary — Whether failure to appoint investigation committee under reg 37(5), 37A and 37D of the Regulations — Whether disciplinary authority properly constituted — Whether there was condonation of applicant's misconduct by delay in taking action

Civil Procedure — Judicial review — Dismissal of public servant — Function of court — Whether to review decision or to rehear and re-assess case — Situations when court will interfere

The applicant was a lance corporal of the Royal Malaysian Police Force. On 16 August 2005 he underwent a urine test which showed positive for dangerous drug, type morphine. Vide a show cause letter, the applicant was charged for misconduct of insubordination under reg 4(2)(i) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations') with a view to dismissal or a reduction in rank pursuant to reg 37 of the Regulations on the ground that the applicant's urine test result was positive for dangerous drug type morphine and thereby violating reg 7(1) of the same Regulations. The applicant made his written representation to the disciplinary authority ('DA') denying the charge and claimed that he was taking a cough medicine due to severe cough. The DA however found that the applicant had failed to exculpate himself from the disciplinary charge and sentenced him to dismissal with immediate effect. The applicant commenced this judicial review application for an order of certiorari to quash the decision of dismissal made by the DA and for arrears of pay, emoluments and other benefits that the applicant was entitled from the date of dismissal to the date of full settlement. The applicant raised the following issues for determination: (a) whether the

disciplinary action was taken in compliance with regs 7(1) and 7(2) of the Regulations; (b) whether the urine test report was valid in law; (c) whether the first respondent had breached the rules of natural justice by not according the applicant a reasonable opportunity of being heard, namely by not considering the defence, by not conducting oral hearing and by not appointing an investigation committee under regs 37(5), 37A and 37D of the Regulations; (d) whether 'damaging documents' had been considered by the first respondent without giving the applicant any notice or opportunity to rebut, contradict or controvert the contents of such documents; (e) whether the DA was properly constituted; (f) whether the presence of Insp Lee Kok Hong invalidated the disciplinary proceeding; and (g) whether there was condonation on the part of the respondent towards the misconduct of the applicant.

Held, allowing the application with costs:

(1) The court will only intervene in disciplinary cases where there is a fundamental procedural flaw namely whether there has been an error in the process or whether there was procedural irregularity in the decision making process leading to the public officer's dismissal (see para 3(c)).

(2) The disciplinary action was taken under reg 4(2)(i) of the Regulations for insubordination based on an offence under reg 7(1) of the Regulations and no reference was made to reg 7(2) of the Regulations in the charge. The charge was valid as long as it contained an offence under reg 7(1), namely using or consuming any dangerous drug other than for medicinal purposes. There is no requirement for the charge to refer to the medical certificate under reg 7(2) of the Regulations at the show cause stage. Neither was it a prerequisite to tender the medical certificate at the show cause stage of the disciplinary proceedings. Hence, the applicant's submission that the disciplinary proceedings was null and void for non-compliance of regs 7(1) and 7(2) was misconceived (see para 4(a)(iii)).

(3) On the issue that the validity of urine report was never pleaded in the applicant's statement under O 53, the contention was without merits as the said issue was covered by the applicant's statement that the dismissal was contrary to regs 7(1) and 7(2) of the Regulations although such fact was not specifically pleaded in the statement (see para 4(b)(ii)).

(4) The applicant was accorded with a reasonable opportunity of being heard when he was given 21 days to make his representation which he did without any complaint or protest. A fair hearing does not mean the applicant must be heard orally (see para 4(c)(iii)).

(5) It is clear from reg 37(5) that only if the DA is of the opinion that the case against the officer requires further clarification, the DA may establish an investigation committee for the purpose of obtaining further

clarification. In this case since no investigation committee was set up, it was not the duty of the court to intervene since that was the matter of discretion for the DA. If the DA required further clarification and set up an investigation committee it was then the discretion of the investigation committee whether or not to grant the applicant an opportunity to be represented by an officer or by advocate (see para 4(c)(iii)).

(6) The medical certificate as required under reg 7(2) was a very important document which rendered the applicant liable to disciplinary action with a view to dismissal. Such a document was not supplied to the applicant during the show cause stage but was served on the first and second respondents during the disciplinary proceedings. The DA had considered such a document without giving the applicant any opportunity to rebut its contents. This was tantamount to the DA considering the respondents' version at the back of the applicant. This clearly constituted procedural unfairness which warranted the interference of the court in the decision making process of the DA. The DA had failed to comply with the rules of natural justice in its decision making process (see para 4(d)(iii)).

(7) The presence of Insp Lee Kok Hong did not invalidate the disciplinary proceeding. He was appointed as a secretariat for DA's meeting for applicant's disciplinary charges and as a secretariat, he was responsible to present the facts and investigation report to the DA. He was not the investigating officer for the disciplinary misconduct against the applicant and he was not involved in the decision making process. There was no evidence to show that his presence had in any way affected/influenced the decision of the DA (see para 4(f)(iii)).

(8) The respondents took almost five years to issue a show cause letter to the applicant after the alleged misconduct had taken place and in the mean time allowed the applicant to continue to serve in the Force. The respondents did not offer any explanation why they took five years to issue the show cause letter. The respondents who, with full knowledge of the applicant's alleged misconduct, allowed the applicant to continue to serve in the force for five years was deemed to have condoned the applicant's alleged misconduct in the absence of any explanation for the delay in issuing the show cause letter. The respondents could not now dismiss the applicant for the misconduct they had condoned (see para 4(g)(iii)).

[Bahasa Malaysia summary

Pemohon ialah lans korporal dalam Angkatan Polis DiRaja Malaysia. Pada 16 Ogos 2005 dia menjalani ujian air kencing yang menunjukkan positif dadah berbahaya, jenis morfin. Melalui surat tunjuk sebab, pemohon telah dituduh kerana salah laku kerana keingkaran di bawah peraturan 4(2)(i)

Peraturan-Peraturan Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan tersebut') dengan pandangan untuk pemecatan atau penurunan pangkat menurut peraturan 37 Peraturan tersebut atas alasan bahawa ujian air kencing pemohon adalah positif kerana dadah berbahaya jenis morfin dan oleh itu melanggar peraturan 7(1) Peraturan tersebut. Pemohon telah membuat representasi bertulisnya kepada pihak berkuasa tatataertib ('PBT') menafikan pertuduhan dan mendakwa bahawa dia mengambil ubat batuk kerana batuk kuat. PBT itu bagaimanapun mendapati pemohon telah gagal membebaskan dirinya daripada pertuduhan tatatertib itu dan telah menghukumnya dengan pemecatan serta merta. Pemohon telah memulakan permohonan semakan kehakiman itu untuk perintah certiorari bagi membatalkan keputusan pemecatan yang dibuat oleh PBT dan untuk tunggakan gaji, emolumen dan faedah lain yang berhak diperoleh oleh pemohon dari tarikh pemecatan itu hingga tarikh penyelesaian penuh. Pemohon telah menimbulkan isu-isu tersebut untuk ditentukan: (a) sama ada tindakan tatatertib yang diambil mematuhi peraturan 7(1) dan (2) Peraturan tersebut; (b) sama ada laporan ujian air kencing itu sah dari segi undang-undang; (c) sama ada responden pertama telah melanggar rukun keadilan asasi dengan tidak memberikan pemohon peluang munasabah untuk didengar, iaitu dengan tidak mengambil kira pembelaan, dengan tidak menjalani perbicaraan lisan dan tidak melantik jawatankuasa siasatan di bawah peraturan 37(5), 37A dan 37D Peraturan tersebut; (d) sama ada 'damaging documents' telah diambil kira oleh responden pertama tanpa memberikan pemohon apa-apa notis atau peluang untuk mematah, menyangkal atau mempertikaikan kandungan dokumen-dokumen tersebut; (e) sama ada PBT telah dibentuk dengan betul; (f) sama ada kehadiran Insp Lee Kok Hong mentaksahkan prosiding tatatertib itu; dan (g) sama ada responden telah membiarkan salah laku pemohon berlaku.

Diputuskan, membenarkan permohonan dengan kos:

(1) Mahkamah hanya akan campur tangan dalam kes-kes tatatertib di mana terdapat kelemahan prosedur yang penting iaitu sama ada terdapat kesilapan dalam proses atau sama ada terdapat luar aturan prosedur dalam proses membuat keputusan yang membawa kepada pemecatan pegawai awam itu (lihat perenggan 3(c)).

(2) Tindakan tatatertib telah diambil di bawah peraturan 4(2)(i) Peraturan tersebut kerana keingkaran berdasarkan kesalahan di bawah peraturan 7(1) Peraturan tersebut dan tiada rujukan dibuat kepada peraturan 7(2) Peraturan tersebut dalam pertuduhan itu. Pertuduhan itu sah selagi ia mengandungi kesalahan di bawah peraturan 7(1), iaitu mengguna atau mengambil apa-apa dadah berbahaya selain daripada untuk tujuan perubatan. Tiada keperluan untuk pertuduhan itu merujuk kepada perakuan perubatan di bawah peraturan 7(2) Peraturan tersebut di peringkat tunjuk sebab. Juga ia bukan keperluan untuk menenderkan perakuan perubatan di peringkat tunjuk sebab prosiding tatatertib itu.

Justeru, hujah pemohon bahawa prosiding tatatertib adalah terbatal dan tidak sah kerana ketidakpatuhan peraturan 7(1) dan (2) telah disalah tanggap (lihat perenggan 4(a)(iii)).

(3) Berhubung isu bahawa kesahan laporan air kencing itu tidak pernah dipli dalam penyataan pemohon di bawah A 53, hujah itu tanpa merit kerana isu tersebut terdapat dalam penyataan pemohon bahawa pemecatan itu bertentangan dengan peraturan 7(1) dan (2) Peraturan tersebut meskipun fakta sedemikian tidak dipli secara spesifik dalam penyataan itu (lihat perenggan 4(b)(iii)).

(4) Pemohon telah diberikan peluang yang munasabah untuk didengar apabila dia diberikan 21 hari untuk membuat representasinya yang mana dia telah melakukan tanpa apa-apa aduan atau bantahan. Perbicaraan adil tidak bermaksud pemohon perlu didengar secara lisan (lihat perenggan 4(c)(iii)).

(5) Ia jelas daripada peraturan 37(5) bahawa hanya jika PBT berpendapat yang kes terhadap pegawai itu memerlukan penjelasan selanjutnya, PBT boleh menubuhkan jawatankuasa siasatan bagi tujuan memperoleh penjelasan lanjut. Dalam kes ini oleh kerana tiada jawatankuasa siasatan ditubuhkan, ia bukan tugas mahkamah untuk campur tangan kerana ia suatu perkara budi bicara untuk PBT. Jika PBT menghendaki penjelasan lanjut dan menubuhkan jawatankuasa siasatan ia dengan itu adalah budi bicara jawatankuasa siasatan sama ada atau tidak untuk memberi pemohon peluang untuk diwakili oleh seorang pegawai atau peguambela (lihat perenggan 4(c)(iii)).

(6) Perakuan perubatan seperti yang dikehendaki di bawah peraturan 7(2) adalah dokumen penting yang menyebabkan pemohon bertanggungjawab kepada tindakan tatatertib dengan pandangan untuk pemecatan. Dokumen sedemikian tidak dibekalkan kepada pemohon sepanjang peringkat tunjuk sebab tetapi telah disampaikan ke atas responden-responden pertama dan kedua semasa prosiding tatatertib. PBT telah mengambil kira dokumen tersebut tanpa memberikan pemohon apa-apa peluang untuk mematahkan kandungannya. Ini sama seperti PBT mengambil kira versi responden-responden di belakang pemohon. Ini jelas merupakan ketidakadilan prsedural yang mewajarkan campur tangan mahkamah dalam proses membuat keputusan PBT. PBT telah gagal untuk mematuhi rukun keadilan asasi dalam proses membuat keputusan (lihat perenggan 4(d)(iii)).

(7) Kewujudan Insp Lee Kok Hoong tidak membatalkan prosiding tatatertib. Dia telah dilantik sebagai sekretariat untuk mesyuarat PBT bagi pertuduhan tatatertib pemohon dan sebagai secretariat, dia bertanggungjawab untuk mengemukakan fakta dan laporan siasatan kepada PBT. Dia bukan pegawai siasatan untuk salah laku tatatertib

terhadap pemohon dan dia tidak terlibat dalam proses membuat keputusan. Tiada keterangan menunjukkan bahawa kehadirannya dalam apa cara telah menjejas/mempengaruhi keputusan PBT (lihat perenggan 4(f)(iii)).

(8) Responden mengambil hampir lima tahun untuk mengeluarkan surat tunjuk sebab kepada pemohon selepas salah laku yang dikatakan itu berlaku dan sementara itu membenarkan pemohon meneruskan perkhidmatan dalam angkatan itu. Responden-responden tidak menawarkan apa-apa penjelasan kenapa mereka mengambil lima tahun untuk mengeluarkan surat tunjuk sebab. Responden-responden yang, dengan pengetahuan penuh tentang salah laku pemohon yang dikatakan itu, telah membenarkan pemohon meneruskan perkhidmatan dalam angkatan itu selama lima tahun telah dianggap telah membiarkan salah laku pemohon yang dikatakan itu berlaku kerana tiada apa-apa penjelasan untuk kelewatan mengeluarkan surat tunjuk sebab itu. Responden-responden tidak boleh kini memecat pemohon kerana salah laku yang mereka telah biarkan berlaku (lihat perenggan 4(g)(iii)).]

Notes

For cases on judicial review in general, see 1(1) *Mallal's Digest* (5th Ed, 2015) paras 303–457.

For cases on judicial review in general, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5572–5612.

Cases referred to

Abd Razak bin Atan v Dato' Hj Ahmad Ragib bin Hj Mohd Salleh (sued in his capacity as Assistant Chief Administrator to the Inspector General of Police (Disciplinary) & Ors [2010] 3 MLJ 753, CA (refd)

Azman bin Abdullah v Ketua Polis Negara [1997] 1 MLJ 263, CA (refd)

B Surinder Singh Kanda v The Government of Federation of Malaya [1962] 1 MLJ 169, PC (refd)

Chan Kwai Chun v Lembaga Kelayakan [2002] 3 MLJ 550, CA (refd)

Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141, HL (refd)

Ganasan a/l Marimuthu v Public Services Commission & Anor [1998] 4 MLJ 280; [1998] 4 CLJ 331, CA (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114, SC (refd)

Inspector-General of Police & Anor v Alan Noor bin Kamat [1988] 1 MLJ 260, SC (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417, FC (refd)

MUI Bank Bhd Johor v Tee Puat Kuay [1993] 3 MLJ 239, HC (refd)

Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153, FC (refd)
Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573, FC (refd)
Sazali bin Abdullah v Ketua Polis Negeri Perak & Ors [2007] 2 MLJ 370; [2007] 2 AMR 64, HC (refd)
Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364, SC (refd)
Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor [2006] 6 MLJ 229; [2006] 4 CLJ 59, CA (refd)
Yusri bin Yahaya v PP Case No P0603–182–12 of 2011 (unreported), CA (refd)

Legislation referred to

Federal Constitution arts 135(2), 140(6)(b), 144(1), (6)
Public Officers (Conduct and Discipline) Regulations 1993 regs 4(2)(i), 7(1), (2), 37(2), (4), (5), 37A, 37B, 37B(4), 37C, 37D
Rules of Court 2012 O 53
The Police Force Commission, Instrument of Delegation of Certain Functions, Powers, Duties and Responsibilities Schedule, Part I, Item 8

Abrina Zubir (Maniam Nair & Co) for the applicant.
Mazlifah Ayob (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Teo Say Eng J:

INTRODUCTION

[1] This is a substantive application for judicial review for a declaration or an order of certiorari to quash the decision of dismissal made by the disciplinary authority ('DA') and for arrears of pay, emoluments and other benefits that the applicant was entitled from the date of dismissal to the date of full settlement.

[2] Background facts:

(a) the applicant was a lance corporal of the Royal Malaysian Police Force, stationed at IPD Nusajaya, Johor. On 16 August 2005 he was told by the Ketua Polis Balai to undergo a urine test. The urine test was conducted by one Abdul Halim bin Ghafar, Pegawai Sains of the Department of Pathologist, Hospital Sultanah Aminah Johor Bahru. The urine test report shows that applicant's urine was positive for dangerous drug, type morphine (see exh SAS5 of encl 28).

Subsequently on 29 August 2005, a medical officer of Hospital Sultanah Aminah upon perusing the applicant's urine laboratory report and having performed the necessary medical test on the applicant, certified that the applicant had used or consumed dangerous drug, type morphine (see exh SAS7 of encl 28);

(b) vide a show cause letter dated 31 May 2010, the applicant was charged for misconduct of insubordination under reg 4(2)(i) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations 1993') with a view to dismissal or a reduction in rank pursuant to reg 37 of the Regulations 1993 on the ground that the applicant's urine test result was positive for dangerous drug type morphine and thereby violating reg 7(1) of the same Regulations (see exh WCF1 of encl 10);

(c) vide a letter dated 19 July 2010, the applicant made his written representation to the DA denying the charge and claimed that he was taking a cough medicine due to severe cough (see exh WCF2 of encl 10); and

(d) vide a letter dated 21 June 2011, the DA informed the applicant that the DA found that the applicant had failed to exculpate himself from the disciplinary charge and sentenced him to dismissal with immediate effect (see exh WCF3 encl 10).

LEGAL PRINCIPLES ON JUDICIAL REVIEW

[3] The legal principles on judicial review has been succinctly stated by the senior federal counsel for the respondents as follows:

(a) it is trite that judicial review is not an appeal from a decision but a review of the decision making process. In reviewing decision of inferior tribunals including decision of the disciplinary authorities, the court is not entitled to consider whether the decision itself was fair and reasonable (see *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141);

(b) the function of the court in judicial review is to review decision of the disciplinary authorities and not to rehear the case by review, re-assess, re-appreciate, reappraise evidence, or draw its own inference as to facts from the evidence. Weighing and assessing the evidence is the function of the disciplinary authorities. The court cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence (see *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 (FC) (TAB 3 MBA) at pp a–b: *Chan Kwai Chun v Lembaga Kelayakan* [2002] 3 MLJ 550);

(c) the court will only intervene in disciplinary cases where there was a fundamental procedural flaw namely whether there has been an error in

the process or whether there was procedural irregularity in the decision making process leading to the public officer's dismissal;

(d) authorities have held that so long as the statutory procedures have been followed assiduously, the courts will not interfere with the substantive findings of the disciplinary tribunal as the court should not substitute what it thinks is the correct decision lest be itself guilty of usurping power of administrative (see *Kerajaan Malaysia & Ors v Tay Chai Huat*); and

(e) a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment, not to review the punishment or penalty: see *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153.

ISSUES FOR DETERMINATION

[4] The applicant has raised ten issues for determination which may be summarised as follows:

(a) whether the disciplinary action was taken in compliance with reg 7(1) and (2) of the Public Officers (Conduct and Discipline) Regulations 1993?

(i) the applicant's submission:

The applicant submits that the respondents have failed to comply with reg 7(1) and 7(2) before the commencement of the disciplinary action against the applicant based on the following grounds:

(A) the medical certificate as envisaged in reg 7(2) is a prerequisite to any disciplinary action taken under reg 7(1) and 7(2) of the Regulations 1993. It is clear from the evidence adduced that the disciplinary action had commenced vide a show cause letter containing a charge issued by the first respondent on 31 May 2010 whereas the said medical certificate under reg 7(2) was only served on the first respondent during the disciplinary proceedings on 6 June 2011; and

(B) the charge as contained in the show cause letter is also bad in law as it failed to refer to the medical certificate under reg 7(2) of the Regulations 1993;

(ii) the respondents' submission:

The applicant's urine was tested positive for dangerous drug type morphine. The applicant cannot prove that the morphine was administered for medicinal purpose by a medical practitioner. Thus, the applicant had flouted reg 7(1) (see urine lab report from Department of Pathologist, Hospital Sultanah Aminah at exh SAS5 of encl 28).

Subsequently, Dr Chua Chak Yong, a government medical officer of Hospital Sultanah Aminah having examined the applicant's urine lab report and performed the necessary medical tests on the applicant, certified that:

(A) the applicant was using or consuming dangerous drug other than for medicinal purpose prescribed by a medical practitioner; and

(B) the applicant is abusing dangerous drug.

(see *perakuan pegawai perubatan kerajaan* at exh SAS7 encl 28).

On the account, the appellant is liable to disciplinary action with a view to dismissal under reg 7;

(iii) ruling by the court:

It is to be noted that the disciplinary action was taken under reg 4(2)(i) of the 1993 Regulations for insubordination based on an offence under reg 7(1) of the 1993 Regulations and no reference was made to reg 7(2) of the 1993 Regulations in the charge. I have perused the charge as contained in the show cause letter. I find that the charge is valid as long as it contains an offence under reg 7(1), namely using or consuming any dangerous drug other than for medicinal purposes.

I am of the considered view that there is no requirement for the charge to refer to the medical certificate under reg 7(2) of the 1993 Regulations at the show cause stage of the disciplinary proceedings.

Neither was it a prerequite to tender the said medical certificate at the show cause stage of the disciplinary proceedings. I therefore find that the applicant's submission that the disciplinary proceedings is null and void for non compliance of reg 7(1) and 7(2) is misconceived;

(b) whether the urine test report by Abdul Halim Ghafar Pegawai Sains (Kimiahayat) Jabatan Patologi, Hospital Sultanah Aminah, Johor Bahru dated 16 August 2005 was valid in law?

(i) the applicant's submission:

The applicant submits that the urine test report by Abdul Halim Ghafar is not valid in law based on an unreported Court of Appeal decision in *Yusri bin Yahaya v Public Prosecutor* P0603–182–12 of 2011 on 28 June 2011 which held that an examination of any urine specimen by a Pegawai Sains is not valid since he does not have the power to conduct such examination.

Hence any charge based on such urine test report is defective;

(ii) the respondents' submission:

Firstly, the respondents submit that the challenge on validity of the urine lab report was never pleaded in the applicant's statement under O 53 of the Rules of Court 2012. Hence it is trite law that parties are bound by their pleadings. The applicant must not be allowed to raise an issue that was never pleaded.

In the alternative, the respondents submit that the decision of the criminal case of *Yusri bin Yahaya* is not applicable in judicial review proceedings on the ground that the decision is not applicable retrospectively on a disposed disciplinary proceeding where the DA was functus officio.

The DA made its decision on 6 June 2011 which was communicated to the applicant via a letter dated 22 June 2011. As such, the DA was functus officio. Whereas the decision of the criminal case of *Yusri bin Yahaya* only came two years after the DA was void of office.

Next, the applicant never complained to the DA about the day when his urine sample was collected. Nor did the applicant challenge the validity of the urine lab report in his written representation to the DA. Hence, the applicant must not be allowed to make this collateral attack at this stage against the DA which was already functus officio.

Furthermore, a disciplinary proceeding must not be equated with a criminal court proceeding. The Federal Court has firmly stated that the courts cannot introduce technicalities of a court of law regarding standard of proof, the rules of evidence and court procedure to the disciplinary authority. This pronouncement was made in the case of *Kerajaan Malaysia & Ors v Tay Chai Huat*

The rationale for the above rule is simple, that is, a departmental disciplinary action is concerned not with criminal offence but with misconduct.

In the present case, the fact is that the applicant's urine was tested positive for morphine.

Therefore, the respondents submit that the case of *Yusri Bin Yahaya* has no application in disciplinary proceedings and has no bearing on the validity of DA's decision;

(ii) ruling of the court:

On the issue that the validity of urine report was never pleaded, in the applicant's statement under O 53, I am of the considered view that such a contention is without merits as the said issue is covered by the applicant's statement that the dismissal was in contrary to reg 7(1) and 7(2) of the 1993 Regulations although such fact was not specifically pleaded in the statement.

Be that as it may, I agree with the respondent's submission that the principles laid down in *Yusri*'s case are not applicable retrospectively on disciplinary proceedings which was concluded two years before the *Yusri*'s case was decided;

(c) whether the first respondent has breached the rules of natural justice by not according the applicant a reasonable opportunity of being heard, namely by not considering the defence, by not conducting oral hearing and by not appointing an investigation committee under regs 37(5), 37A and 37D of the 1993 Regulations:

(i) the applicant's submission:

Since the applicant has denied the allegations as contained in the charge in the show cause letter and has stated that he took the 'ubat batuk' for his severe cough, under such circumstances the first respondent was required to set up an investigation committee under regs 37(5), 37A–37D to ascertain as to which version, that is, the respondent's allegation or the applicant's defence was correct before making any final decision in the disciplinary proceedings.

Hence the applicant has been denied of a fair and reasonable hearing as provided for under art 135(2) of the Federal Constitution;

(ii) the respondents' submissions:

The issue and question on reasonable opportunity of being heard in art 135(2) of the FC had been settled by the Supreme Court in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 (TAB 8 RBA) and the Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 (TAB 9 RBA).

In *Ghazi*'s case, the Supreme Court held that 'the 'right to be heard' does not mean the right to be heard orally or an obligation to hold an inquiry. What it means is that the officer concerned should be given a full opportunity of stating his case.

Equally, right to be heard in the context of fairness under the statutory procedure is satisfied if a person is given an opportunity to make written representations to the deciding body. In *Ganasan a/l Marimuthu v Public Services Commission & Anor* [1998] 4 MLJ 280 at p 290; [1998] 4 CLJ 331 at p 342, His Lordship NH Chan JCA said as follows:

> The Privy Council as well as the Supreme Court have held that in employing the procedure prescribed in general order 26 and the former reg 30 of the general orders, the requirements of fairness have been satisfied by an opportunity to make written representations to the deciding body. In all such cases, it has been held time and again by the highest courts in the land that written representations will suffice and that a fair hearing does not mean that

there must be an opportunity to be heard orally by the officer in person or by his lawyer at the disciplinary authority stage.

... It is only if a committee of inquiry is appointed because the disciplinary authority requires further clarification in the case against the officer (General Order 26(5)), that he will have the opportunity of giving oral testimony to exculpate himself (General Order 26(6)). It is only then that the committee has discretion to allow him to be represented by an officer of the public service or, in exceptional cases, by an advocate and solicitor (General Order 26(8)).

Regulations 37(4) and (5) (TAB 7 RBA) states:

(4) If the officer does not make any representation within the period specified in paragraph (2)(b), or if the officer makes such a representation but the representation does not exculpate himself to the satisfaction of the appropriate Disciplinary Authority, the Disciplinary Authority shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(5) If the appropriate Disciplinary Authority is of the opinion that the case against the officer requires further clarification, the Disciplinary Authority may establish an Investigation Committee for the purpose of obtaining further clarification.

The decision on formation of an investigation committee is for the DA to exercise and not for the court: *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; [2008] 6 CLJ 573).

In the case of *Kerajaan Malaysia & Ors v Tay Chai Huat*, the Federal Court held that the decision on formation of an investigation committee is not amenable for judicial review. At p 150, the Federal Court held:

(i) if the DA considered that no further clarification was required, then the officer facing disciplinary charges could not insist or demand that a committee of inquiry be appointed.

(ii) the opinion of the DA that the case did not require further clarification through the appointment of a committee of inquiry under general O 26 of the GO was not subject to a review by the courts.

The respondents submit that the applicant was accorded with a reasonable opportunity of being heard when he was asked to tender his written representation to state the grounds in refuting the charge against him, which he did without complaint or protest.

The disciplinary proceeding against the applicant culminated when reg 37(4) applies and he was dismissed. No investigation committee was formed under reg 37(5), as the DA did not require further clarification. Consequently, the opportunity for the applicant to give oral testimony did not arise.

A On the above premise, the DA's decision making process has conformed to the concept of natural justice guaranteed by art 135 of the Federal Constitution and ought not be disturbed;

(iii) ruling of the court:

B Having considered the written submissions of both parties, I am satisfied that the applicant was accorded with a reasonable opportunity of being heard when he was given 21 days to make his representation which he did without any complaint or protest. It cannot be disputed that a fair hearing does not mean the applicant must be heard orally.

C It is clear from reg 37(5) that only if the appropriate DA is of the opinion that the case against the officer requires further clarification, the DA may establish an investigation committee for the purpose of obtaining further clarification. In this case since no investigation committee was set up, it is not the duty of this court to intervene since that is the matter of discretion D for the DA. If the DA requires further clarification and sets up an investigation committee it is then the discretion of the investigation committee whether or not to grant the applicant an opportunity to be represented by an officer or by advocate;

E (d) whether 'damaging documents' had been considered by the first respondent without giving the applicant any notice or opportunity to rebut, contradict or controvert the contents of such documents:

(i) the applicant's submission

F The applicant submits that the applicant was not supplied with a copy of the medical certificate under reg 7(2) when he was served with a show cause letter on 31 May 2010. When the first respondent and the second respondent were given a copy of such medical report during the disciplinary proceeding on 6 June 2010, they had considered the said G document without giving the applicant any opportunity to rebut, contradiction or controvert the contents of such documents. This is tantamount to hearing the evidence from the respondents' side behind the back of the applicant. This has prejudiced the applicant as he was unaware of the existing of such an important document which has a H clamming effect on his case. This is also in contravention of reg 37B(4) which provides that no documentary evidence shall be used against any officer except that before this he was supplied with one or given access to such evidence.

I The applicant submits that this constitutes procedural unfairness and will render the dismissal bad in law. The applicant has cited at least four cases in support of his contention, namely:

(A) *B Surinder Singh Kanda v The Government of Federation of Malaya* [1962] 1 MLJ 169;

(B) *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 (SC);

(C) *Sazali bin Abdullah v Ketua Polis Negeri Perak & Ors* [2007] 2 MLJ 370; [2007] 2 AMR 64; and

(D) *Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229; [2006] 4 CLJ 59 (CA);

(ii) the respondents' submission:

There is no duty on the DA to produce the urine test lab report together with the show cause letter or to state each and every information or evidence relied by the DA in commencing the disciplinary proceedings against the applicant. As long as the show cause letter fulfills the ingredients of reg 37(2) by concisely and sufficiently notifies the applicant of the ground/charges, the show cause letter is good in law.

Upon receiving the letter, the burden is on the applicant not to merely deny the charge but to produce grounds on which he relies to exonerate himself from the charge, that he did not use or consume the dangerous drug type morphine or he is using or consuming the drug for medicinal purposes.

It is his duty to request for the urine lab report or any other document if he thinks it could help him answer the disciplinary charge. The Federal Court in the case of *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149, at p 155G–H has held as follows:

> In the present case, the respondent did not at any stage request for an oral hearing or for any document to be furnished to him. Therefore, he could not complain that such right was not afforded to him. It is for him to request for an oral hearing or for any document that he thinks could help him to prepare his answer to the charges leveled against him.

He knew that his urine was tested positive for morphine. He was then examined by a medical officer following the revelation of the existence of morphine in his urine. Yet, he did nothing to procure these 'purported important documents' before he submits his written representation.

He did nothing to procure that document before submitting his written representation. The applicant was the one being lackadaisical with the disciplinary proceeding against him and now launching an afterthought attack against the DA's decision. This honourable court must not condone such act.

(iii) ruling of the court:

It is important to note that the medical certificate as required under reg 7(2) is a very important document which shall render the applicant

liable to disciplinary action with a view to dismissal. Such a document was not supplied to the applicant during the show cause stage but was served on the first and second respondents on 6 June 2010 during the disciplinary proceedings. The DA has considered such a document without giving the applicant any opportunity to rebut its contents. I fully agree with the applicant that this is tantamount to the DA considering the respondents' version at the back of the applicant. This clearly constitutes procedural unfairness which warrants the interference of this court in the decision making process of the DA.

Hence I rule that the DA has failed to comply with the rules of natural justice in its decision making process;

(e) whether the DA was properly constituted?

(i) the applicant's submission:

(A) under PU(B) 441/2000, Federal Constitution, The Police Force Commission, Instrument of Delegation of Certain Functions, Powers, Duties and Responsibilities, by virtue of arts 140(6)(b) and 144(6) of the Federal Constitution, the exercise of all powers in respect of all disciplinary matters including the power to impose the punishment of dismissal or reduction in rank for all junior police officers as stated in item 8 of Part I of the Schedule is delegated to a senior police officer of or above the rank of assistant commissioner as chairman and two other senior police officers of or above the rank of superintendent as members;

(B) for the purpose of this disciplinary proceeding, the disciplinary board was set up by appointing three officers, namely one as the chairman and the other two as members of the board:

(1) P/ACP Wong Chong Fooi was appointed as the chairman of the disciplinary board for a term until the disciplinary matter was settled vide a letter of appointment dated 17 September 2009 (see exh WCF5 encl 10);

(2) Superintendant Nik Azlan bin Wan Kadir was appointed as a member of the board for a term of three months vide a letter of appointment dated 12 January 2011 (see exh WCF6 encl 10); and

(3) Superintendant Kamaruddin bin Kutik was appointed as a member of the board for a term of three months vide a letter of appointment dated 22 April 2011 (see exh WCF7 encl 10);

(C) the disciplinary board was conducted on 6 June 2011;

(D) based on the aforesaid facts, the applicant submits that when the disciplinary proceedings started on 6 June 2010, the tenure of the appointment of Superintendent Nik Azlan bin Wak Kadir had expired. Hence, this has resulted in the DA not being properly constituted;

(ii) the respondents' reply:

The DA was constituted under arts 140(6)(b) and 144(6) of the Federal Constitution.

By virtue of PU(B) 441/2000, arts 140(6)(b) and 144(6) of the Federal Constitution provide for the delegation of the commission's functions, powers, duties and responsibilities specified in column 4 of Part I of the Schedule in respect of the members of the force specified in column 2.

Under art 144(1), the functions of the Police Force Commission are, among others, to exercise disciplinary control over members of its service. Under cl 6, the commission may delegate any of the provided functions to any officer in a service to which its jurisdiction extends, or to any board of such officers appointed by it.

Via a letter of appointment dated 17 September 2009 (see exh WCF 5 *afidavit jawapan responden*), ACP Wong Chong Fooi was appointed as the Chairman of Disciplinary Board.

From the moment of his appointment as the chairman and before the rest of DA's members were appointed, ACP Wong Chong Fooi was the DA carrying out his duty as a chairman as sanctioned by the statutes.

Subsequent to the issuance of the show cause letter by the Chairman, Superintendent Nik Azlan bin Wan Kadir and Superintendent Kamaruddin bin Kutik were appointed as members of the DA via appointment letters dated 12 January 2011 and 22 April 2011 respectively (see exhs WCF6 and WXF7 *afidavit jawapan responden*).

In respect of superintendent Nik Azlan bin Kadir's appointment, Dato' Hj Jalaluddin bin Abdul Rahman, who was then the Johor Deputy Police Chief who made the appointment has affirmed in encl 30, that the period of three months mentioned in the letter of appointment does not represent appointment's validity period. Instead it is merely his administrative instruction towards members of the DA to encourage speedy disposal of the case.

Further, under PU(B) 441/2000, there is no expiration period of appointment of members of the DA. Once appointed, the appointment shall continue in force until conclusion of the disciplinary proceeding or

when it is withdrawn or revoked. Dato' Haji Jalaluddin has affirmed that Superintendent Nik Azlan's appointment was never withdrawn or revoked.

Therefore, the respondents submit that the DA was constituted properly and in accordance with law;

(iii) ruling of the court:

I find that the respondents' submission that the letter of appointment of Superintendent Nik Azlan bin Wan Kadir for a period of three months does not represent the validity period of his appointment but merely his administrative instruction towards members of the DA to encourage speedy disposal of the case is higly untenable as the letter of appointment clearly provides that 'Anda dikehendaki mengendalikan kes tatatertib ini dalam tempoh 3 bulan mula tarikh surat ini diterima'.

It cannot be disputed that the letter of appointment speaks for itself. It is not now for the respondents to argue otherwise.

For the above reasons I rule that the DA was not properly constituted;

(f) whether the presence of Inspector Lee Kok Hong has invalidated the disciplinary proceeding?

(i) the applicant's submission:

It can be seen from the minutes of the meeting that Insp Lee as secretariat is also the investigating officer who was allowed to present facts to the DA. His presence has invalidated the disciplinary proceedings on the following grounds:

(A) PU(B) 441/2000 has only permitted specific categories of individuals to the present in such proceedings;

(B) Insp Lee as Pegawai Siasatan/Implementasi Tatatertib, can influence the mind of the chairman and members of the DA and thus prejudiced the decision of the DA as the applicant would not know what was actually presented to the DA; and

(C) Insp Lee as investigation officer has interest in the case.

(ii) the respondents' submission:

The chairman has explained in encl 29 that Insp Lee Kok Hong is merely acting as a secretariat to the DA's meeting and he was never involved in the decision making process between members of the DA. It was also attested that he is not the investigating officer ('IO') for the applicant's disciplinary misconduct case.

The chairman's attestation was corroborated by Insp Lee Kok Hong's own affirmation in encl 32 where he explained his position and involvement in the DA's meeting as follows:

(A) at the material time, he was assuming the post of Inspector Tatatertib at Ibu Pejabat Polis Kontinjen Johor (IPPK Johor);

(B) at the material time, he was positioned at Bahagian Pentadbiran, Cawangan Tatatertib, Unit Siasatan/Implementasi Tatatertib;

(C) as an officer of Unit Siasatan/Implementasi Tatatertib, he may be asked to sit as a secretariat to any DA's meeting. In the present case, he was appointed as a secretariat for the DA's meeting for the applicant's disciplinary charge;

(D) as a secretariat, he is responsible to present the facts and investigation report to the DA, and to record the minutes of the proceedings;

(E) he is not the investigating officer for the disciplinary misconduct against the applicant and he was never engaged with the investigation against the applicant; and

(F) he is not involved in the DA's decision making process.

Inspector Lee Kok Hong also explained that his post as Inspektor Tatatertib Siasatan/Implementasi Tatatertib as shown in the DA's minute of meetings is merely reflecting his status as Inspektor Tatatertib postioned at Bahagian Pentadbiran, Cawangan Taterti, Unit Siasatan/Implementasi Tatatertib.

Inspector Lee Kok Hong was not an interested party or involved in the investigation against the applicant. Hence, the DA's sitting is not tainted with illegality.

(iii) ruling of the court:

Having heard the submissions of both parties I find that the presence of Insp Lee Kok Hong does not invalidate the disciplinary proceeding for the following reasons:

(A) he was appointed as a secretariat for DA's meeting for the applicant's disciplinary charges;

(B) as a secretariat, he is responsible to present the facts and investigation report to the DA;

(C) he is not the investigating officer for the disciplinary misconduct against the applicant;

(D) he was also not involved in the decision making process; and

(E) last but not least there was no evidence to show that his presence has in any way affected/influenced the decision of the DA.

(g) whether there was condonation on the part of the respondent towards the misconduct of the applicant:

(i) the applicant's submission:

It is to be noted that the urine test on the applicant was conducted on 10 August 2005 and the result was revealed on 16 August 2005. The certificate by Dr Chua Chak Yong a government medical officer under reg 7(2) of the 1993 Regulations was issued on 29 August 2005. However the show cause letter was only issued about five years later that is, on 31 May 2010. The applicant made the letter of representation on 19 July 2010 and the disciplinary proceedings only commenced on 6 June 2011 and the letter of dismissal was issued on 21 June 2011. The applicant further averred in his affidavit that Sjn Osman from the IPK Disciplinary Unit told him that the case would be closed if he was not called for a year or two. In the mean time he was allowed to serve in the Force until he received the show cause letter five years later.

The applicant submits that the delay of five years in taking action and the fact that he was allowed to continue to serve in the force with full knowledge of his misconduct by the respondents must surely be acts of condonation on the part of the respondents.

The applicant has cited the following cases in support of his contention:

(A) *Azman bin Abdullah v Ketua Polis Negara* [1997] 1 MLJ 263;

(B) *Inspector-General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260 (SC); and

(C) *MUI Bank Bhd Johor v Tee Puat Kuay* [1993] 3 MLJ 239;

(ii) the respondent's submission:

The concept of condonation was explored by the Federal Court in *Public Services Commission Malaysia & Anor v Vickneswary RM Santhivelu*, (TAB 13 RBA) where it was said at p 594 that 'condonation in the context of employment contract is an act by the employer to excuse or forgive him for the wrongful act committed by the employee. Condonation can be in the active form that is, by the act of telling the person that he has been forgiven for the wrongful act done or by a passive act of not taking any action.

In this case, the respondents submit that, contrariwise, the DA has pursued the disciplinary proceedings against the applicant. There is no evidence of active or passive act of forgiveness by the employer on the applicant.

Next, delay per se is not necessarily conclusive of an intention to condone. In the case of *Abd Razak bin Atan v Dato' Hj Ahmad Ragib bin Hj Mohd Salleh (sued in his capacity as Assistant Chief Administrator to the Inspector General of Police (Disciplinary) & Ors* [2010] 3 MLJ 753, His Lordship Abdul Malik Ishak JCA said at p 909 as follows:

> It must be borne in mind that delay per se is not necessarily conclusive of an intention to condone because it may be explained in the circumstances of each case.
>
> Delay per se can never be a ground for holding that the disciplinary proceedings conducted pursuant to O 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 against the plaintiff should be held null and void and that the decision arrived be set aside.

The respondents submit that there is no evidence that the applicant was forgiven for his disciplinary misconduct. As such, there is no ground to disturb the DA's finding.

(iii) ruling of the court:

It cannot be denied that the respondents took almost five years to issue a show cause letter to the applicant after the alleged misconduct had taken place on 16 August 2005 and in the mean time allowed the applicant to continue to serve in the Force. Furthermore, the respondents had not offered any explanation why they took five years to issue the show cause letter.

I am of the considered view that the respondents who, with full knowledge of the applicant's alleged misconduct, allowed the applicant to continue to serve in the force for five years was deemed to have condoned the applicant's alleged misconduct in the absence of any explanation for the delay in issuing the show cause letter. The respondents cannot now dismiss the applicant for the misconduct they have condoned.

[5] Decision

For the above reasons, I granted order in terms of the application with cost of RM8,000 to be paid by the respondents to the plaintiff and interest at the rate of 4% from the date of dismissal until full realisation.

Application allowed with costs.

Reported by Kanesh Sundrum